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No. 07-9995

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RIVERA
Petitioner,
vs.

THE STATE OF ILLINOIS
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN (P 24381)*
Chief of Research, Training and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

* Counsel of Record

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Assuming, for the sake of argument, that a defense-initiated peremptory challenge was erroneously denied, does that denial standing alone violate any federal constitutional right of the accused, or is the constitution only implicated on the seating of a juror who is not impartial?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing. Counsel were notified timely of the intent to file as amicus.

Argument

The Denial Of A Peremptory Challenge Is Not Constitutional Error, Unless That Denial Itself Constitutes Invidious Discrimination Against the Accused

A. Introduction

The essence of the error of the petitioner's position is revealed in the statement in petitioner's reply brief on the petition for certiorari that "if a state grants the parties the right to exercise peremptory challenges, the erroneous denial of that right violates petitioner's constitutional rights to due process and an impartial jury when it results in the seating of a juror who should have been excused" (first emphasis in the original, second and third emphasis added). This conflates the constitutional right to an impartial jury with the state statutory right to excuse a limited number of jurors without any demonstration of lack of impartiality—a conflation necessary to petitioner's argument—and leaves hanging a critical question. When petitioner says that the erroneous denial of a peremptory challenge results in the seating of a juror "who should have been excused" the question that is critical is on what basis should the juror have been excused? If the answer is simply because the peremptory challenge was authorized and not exercised in a constitutionally prohibited discriminatory manner, then seating the juror does not result in a violation of the constitutional right to an impartial juror. If the answer is that the questioning revealed that the juror was not impartial, then the peremptory-challenge claim disappears, for the claim then is that the accused was denied a proper challenge for cause and was tried by a juror who was not impartial. Petitioner's argument devolves to a claim that the erroneous

denial of any peremptory challenge—which necessarily would include even a simple "miscount" by the trial judge of the number of challenges remaining available—is the denial of the right to an impartial jury. This is a non sequitur.

B. No Constitutional Right Is Involved Here

One criminally accused has a right under the federal[1] constitution to trial by an impartial jury. Challenges for cause are designed to secure this right; persons who may be biased by circumstances, such as relationship to a party, and those expressing a bias, are disqualified from service. Peremptory challenges, on the other hand, though possessing a venerable pedigree, are nonetheless auxiliary to the challenge for cause. "Unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. ...('There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges')."[2] Even before the decision in Martinez-Salazar, this Court considered the situation where defense counsel is required to expend a peremptory challenge to remove a juror who should have been removed on counsel's challenge for cause:

> Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory

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1. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." United States Const., Amend. VI.

2. United States v Martinez-Salazar, 528 US 304, 311, 120 S Ct 774, 779, 145 L Ed 2d 792 (2000).

> challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension....They are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.[3]

Ross, then, rather clearly rejects petitioner's argument—that the seating of a juror not shown to be partial because of the erroneous denial of a peremptory challenge is not only constitutional error, but "structural," causing automatic reversal of any conviction. The constitutional question is whether the jury that sat was impartial, and that issue has never been controverted in these proceedings, defendant insisting that the compromising of a state-granted right to exclude an impartial juror amounts to federal constitutional harm that is reversible without regard to any prejudice.[4]

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3. Ross v Oklahoma, 487 US 81, 88, 108 S Ct 2273, 2278, 101 L Ed 2d 80 (1988) (emphasis supplied).

4. Though no court has so found here (or anywhere, that amicus is aware of), petitioner might argue that the simple fact that the juror was aware the his counsel attempted to remove the juror renders the juror partial. But in any case where a "reverse-Batson" challenge is upheld—and upheld properly—the juror will know that the accused attempted to excuse him or her. The law is not so absurd that an accused can achieve a constitutionally prohibited strike (one based on

The point has been nicely stated by an illustrious panel of the seventh circuit court of appeals in United States v Patterson.[5] Because of a complicated calculation error in the determination of peremptory challenges, defendant was denied several peremptory challenges, receiving fewer than provided by statute. He claimed that this error required reversal without consideration of the question of prejudice. Writing for himself and Judges Posner and Wood, Judge Easterbrook disagreed:

> ● Defendants respond that an error concerning a peremptory challenge always affects a "substantial" right. A right is "substantial" when it is one of the pillars of a fair trial.
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> ● Trial before an orangutan, or the grant of summary judgment against the accused in a criminal case, would deprive the defendant of a "substantial" right even if it were certain that a jury would convict. ...
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> ● For the same reason, a biased tribunal always deprives the accused of a substantial right....Deprivation of counsel likewise so undermines the ability to distinguish the guilty from the

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invidious discrimination) by the simple fact of making it, which perforce taints the juror. Petitioner cannot prevail on this basis.

5. United States v Patterson, 215 F3d 776 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000).

innocent that it always leads to reversal....

- But "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." It is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge.

- When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the substantial right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries.[6]

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6. United States v Patterson, 215 F3d 776, 781 (CA 7, 2000), vacated in part on other grounds, 531 US 1033, 131 S Ct 621, 148 L Ed 2d 531 (2000)(all but the final emphasis supplied, citations omitted). Note also that with regard to application of the statutory requirement that reversal not occur unless a substantial right was impaired the panel pointed to this Court's decision in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), where a juror's failure to respond to a question on voir dire deprived a party of information that would have been useful in exercising a peremptory challenge. The court observed that "the Court concluded that

The only error for consideration in Patterson, then, was non-constitutional, and one not requiring reversal since the "substantial right" involved, the right to an impartial jury, was not compromised by the statutory error. Where a state conviction is involved, a conclusion that no constitutional error is involved ends the inquiry. What the federal system decides is appropriate if there is a violation of federal statute with regard to peremptory challenges—indeed, whether there is or is not a split of authority on that question—is of no moment. Consideration of whether any error of state law that occurred is "harmless beyond a reasonable doubt" or "structural" has no place in a federal court. If the error here, then, was not constitutional, the matter simply is at a close.

A distinction has sometimes been drawn between the "dilution" of the statutory number of peremptory challenges and the "denial" of the exercise of a peremptory challenge. A dilution occurs when a challenge for cause is denied improperly, and the defendant is forced to employ a peremptory challenge to excuse the juror. After Martinez-Salazar it is clear that in either circumstance no constitutional error has occurred. Error can only occur if the improper denial of the challenge for cause

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reversal would not be justified unless a correct response by the juror 'would have provided a valid basis for a challenge for cause.' ... The Court recognized the importance of information to the intelligent exercise of peremptory challenges but concluded that '[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.'"

occurs after all peremptory challenges are exhausted, for then the claim is a constitutional one, that is, that the Sixth Amendment right itself has been violated, as a juror who was not impartial sat. A denial of an exercise of a peremptory challenge occurs either, as in this case, by the refusal by the trial court to allow a strike to be made, or by a miscount, so that the defendant is permitted to exercise fewer challenges than permitted under the applicable statute or court rule. The error in Patterson was a denial of the complete complement of peremptory challenges through a miscount. If a defendant must exercise a peremptory challenge to excuse a juror who should have been excused on his or her challenge for cause, if a defendant is given his or her full complement of peremptory challenges but is improperly denied the exercise of a challenge as to a particular juror, or if a defendant is denied the exercise of his or her full complement of challenges because of a miscount or computational error, as in Patterson, so long as the jury that sits is impartial, no federal constitutional violation of any sort has occurred.

Though there is some authority for the proposition that the erroneous denial of a peremptory challenge is constitutional error, that authority is at best superficial in its reasoning, and at worst casual, failing to understand that not every deviation from required state procedures can "be viewed as a federal constitutional violation," for such a doctrine would "make a large volume of state...judicial proceedings subject to complaint in the federal courts on due process grounds,"[7] converting ordinary claims of violation of state procedural requirements into

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7. See e.g. Bills v Henderson, 631 F2d 1287, 1298 (CA 6, 1980).

constitutional claims. An example is Aki-Khuam v Davis.[8]

The trial judge in Aki-Khuam –a death-penalty case– required more than a race-neutral reason to justify the challenges:

> ...the trial court rejected Petitioner's race-neutral explanations not because they demonstrated a discriminatory motive, but rather because the trial court found the reasons, "terrible,"unsupported in the record, based on a prospective juror's response to a "trick question," or due to defense counsel's introduction of the work "slickster."[9]

But the conclusion of the court that the misapplication of Batson and its progeny was both constitutional and reversible error is at once superficially reasoned and internally inconsistent. The panel stated its ipse dixit that the error violated the accused's "due process and equal protection rights" by depriving him of "his statutory right to exercise peremptory challenges" for any reason other than a discriminatory one. Though there was neither a claim nor a finding that the jury was not impartial, the panel found that because the jury was created in a manner that violated statutory requirements by denying an arguably race-neutral peremptory challenge, the constitution was violated. Why this violation of state law constituted constitutional error was never explained, and reversal followed,

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8. Aki-Khuam v Davis, 339 F3d 521 (CA 7, 2003). The opinion, somewhat curiously, arises from the same circuit as Patterson though Patterson is not mentioned in the opinion.

9. 339 F3d at 527.

apparently automatically, though the panel never denominated the error as "structural" or in any way discussed prejudice –except in a footnote, where, in outlining that which it was not saying, the panel contradicted its failure to discuss principles of prejudice and harmless error.[10] And it is in this footnote that the panel's entire harmless-error analysis appears: the error "was not harmless."[11]

The unreasoned conclusions reached in Aki-Khuam[12] cannot be squared with the reasoned analysis of Patterson that where the defendant was

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10. "We are careful to note that today's decision...should not be read to hold that (i)the Constitution provides a per se right to peremptory challenges, (ii) the Constitution per se requires states to adhere to their own rules of trial procedure, or (iii) the harmless-error doctrine is inapplicable." 339 F3d at 529, fn 6.

11. 339 F3d at 529, fn 6.

12. The panel's conclusion that the state could not provide greater protections for jurors than mandated by Batson is also fundamentally mistaken. So long as applied equally to both prosecution and defense, there is absolutely no constitutional impediment to the state creation of a peremptory challenge system that contains different methods than required by the constitution for establishing a prima facie case of discrimination, different allocations of the burden of proof, or even that establishes a "quasi-challenge for cause" as a required justification for a strike, if the state chooses to create such a system (or to abolish the peremptory challenge altogether), whether the protection of the prospective juror is established under the state constitution or state statute.

"tried by an impartial adjudicator" there is no constitutional error, and there is a strong presumption that any statutory errors that may have occurred are subject to harmless-error analysis, for "[I]t is impossible to group an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. When the jury that actually sits is impartial, as this one was, the defendant has enjoyed the substantial right. Peremptory challenges enable defendants to feel more comfortable with the jury that is to determine their fate, but increasing litigants' comfort level is only one goal among many, and reduced peace of mind is a bad reason to retry complex cases decided by impartial juries."[13] In other words, peremptory challenges exist to assist in the empaneling of an impartial jury, which is the substantial right enjoyed by the accused; where error occurs in the exercise of peremptory challenges that does not somehow cause the seating of a partial jury, that error is not constitutional.

Also well making the point, and presaging Patterson, is the discussion of Judge Easterbrook dissenting from the denial of rehearing en banc in United States v Underwood,[14] a case recognized as of no force after Martinez-Salazar.[15] The panel reversed

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13. Patterson, at 781.

14. United States v Underwood, 130 F3d 1225 (CA 7, 1997).

15. The panel decision is found at United States v Underwood, 122 F3d 389 (CA 7, 1997); see United States v Jackson, 2001 WL 388852, 2 (S.D.Ind.,2001): "The bottom line is that Underwood's discussion of the need for a clear understanding of the peremptory challenge process remains good law, but the automatic reversal

because of a confusion in the jury-selection process that prevented defense counsel from making "the most advantageous use of their peremptory challenges." The panel did not find that the error was prejudicial under the federal statute precluding relief unless the error affects a substantial right, but believed reversal required by the dicta in Swain v Alabama, since repudiated in Martinez-Salazar, as noted previously. Anticipating Martinez-Salazar by almost three years, Judge Easterbrook for himself and Judges Posner, Manion, and Evans, noted that "[P]erfection is elusive" and in review of trials for error "the quest for the perfect is the enemy of the good."[16] The panel, said Judge Easterbrook, had no authority to reverse without applying FRCP 52(a), providing that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," for the rule (which in the federal system is passed by Congress and is thus in effect a statute) "does not except errors affecting peremptory challenges. Any error that does not affect substantial rights shall be disregarded."[17] Of course, when a state conviction is involved, application of federal statutes concerning harmless error is inappropriate; the first question is whether a constitutional error occurred, and the question of harmless error is never reached if no constitutional error is found. None occurred here.

It is appropriate to recall the basis of Batson and its progeny. It is the right of the juror to serve which is protected, with both the defendant and the prosecutor given third-party standing to assert the

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standard is no longer applicable."

16. 130 F3d at 1227.

17. 130 F3d at 1227.

constitutional rights of the juror.[18] If a juror is "overprotected" by a state trial judge who disallows a permissible defense peremptory challenge, the accused is not aggrieved (nor is the juror, so as to even theoretically give the accused third-party standing to litigate the juror's rights on appeal). The accused is only aggrieved if the juror is not impartial; again, the seating of a partial juror is an independent claim, not involved in this case.[19]

C. Erroneous Denial Of A Peremptory Challenge is Not Structural Error In Any event.

Again, the "structural or subject to harmless-error" review question should not be considered here, for there is no constitutional error to review. But if somehow the error is viewed as

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18. See Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Georgia v McCollum, 505 U.S. 42, 49, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

19. There is, amicus believes, one other possibility, not involved here. That is, if a trial judge were to deny the exercise of a peremptory challenge with the denial itself based on invidious discrimination —for example, stating that some ethic or racial group is not allowed the full complement of challenges permitted by state law— then the denial of the state right on an invidious criteria would be unconstitutional, for even a right or privilege created by state law cannot be denied based on an invidious classification. Since the jury that sat would nonetheless be impartial, that situation might raise the "structural or subject to harmless-error review" question, but amicus has never heard of a judge behaving in such a manner.

constitutional—though it simply cannot viewed as the denial of the right to an impartial jury—then it cannot be considered as "structural" error. The holding of the Ninth Circuit in United States v Annigoni,[20] a pre-Martinez-Salazar case, to the contrary, is mistaken.

In Salazar the trial court disallowed a peremptory challenge on Batson grounds without finding that the strike was racially motivated. The majority of the court found that it was not bound to apply FRCP 52(a) because automatic reversal for denial of a peremptory challenge was a rule of "long standing," and the error is not susceptible to "quantitative assessment" in the "context of other evidence presented" in order to determine whether it was harmless. Judge Kozinski in dissent concluded that, on the contrary, because the error in the denial of the peremptory challenge does not affect the substantial right afforded by the constitution –an impartial jury– "I find it hard to believe that the [Supreme] Court would now conclude that it's always reversible error to deny a defendant a mere statutory right."[21]

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20. United States v Annigoni (en banc), 96 F3d 1132 (CA 9, 1996).

21. 96 F3d at 1150. As Judge Kozinski observed, "we are forced to choose from two all-or-nothing rules: the error is always harmless or it is never harmless. There is no practical middle ground. Given this choice, I believe the Supreme Court would conclude that this kind of error is always harmless."

That Judge Kozinski was correct and Annigoni and like cases[22] wrong (meaning the entire inquiry is mooted with regard to state convictions, there being no constitutional error) is demonstrated by the later case from this Court in Johnson v United States.[23] There ths Court firmly rejected a claim that Rule 52(a) did not apply because the error complained of was "structural":

> Petitioner agues that ... the error she complains of here is "structural," and is outside Rule 52(b) altogether. But the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure.
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> ***
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> We [have] cautioned against any unwarranted expansion of Rule 52(b)...because it "would skew the Rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed"....Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.[24]

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22. See e.g. United States v McFerron, 163 F3d 952 (CA 6, 1998).

23. Johnson v United States, 520 US 461, 117 S Ct 1544, 137 L Ed 2d 718 (1997).

24. 520 US at 466, 117 S Ct at 1548 (emphasis supplied).

The remaining argument is that application of a harmless-error rule such as Rule 52(b), or even the "harmless beyond a reasonable doubt" test for constitutional error, should always lead to the conclusion that the erroneous preclusion of a peremptory challenge is reversible (essentially, a claim of structural error in different guise). But one returns to Judge Easterbrook's reasoning: the substantial right involved is the right to an impartial jury; "[A]fter McCollum and Ross it is impossible to ground an error concerning peremptory challenges with the denial of counsel or trial before a bribed judge. If the jury that actually sits is impartial, the defendant has enjoyed the substantial right."[25] Were it otherwise even the legislature could not alter the number of peremptory challenges, or abolish them, which is to give them constitutional status though the law is clear that they are a statutory creation.[26]

25.130 F3d at 1229. Judge Easterbrook in Patterson allowed that it was possible that a jury-selection process could become so confused as to affect a substantial right; in United States v Harbin, 250 F3d 532 (CA 7, 2001) the panel so found, because not only was the process confused, but the prosecution, and the prosecution alone, was permitted to exercise a peremptory challenge during trial. The panel concluded that allowing the prosecution unilaterally to use a "pre-trial jury selection tool to alter the composition of the jury mid-trial" affected substantial rights. Cf. United States v Wilson, 355 F3d 358 (CA 5, 2003), where no error was found under Harbin because both parties had this opportunity to exercise a peremptory challenge at the conclusion of trial.

26. Note that in Johnson the trial court had failed to submit an element of the crime to the jury for determination beyond a reasonable doubt, as at

D. Conclusion

An accused has a substantial right –a constitutional right– to trial before an impartial jury. Should a challenge for cause be denied erroneously, when, because all peremptory challenges have been used, there is no opportunity for counsel to excuse that juror, then the error in procedure causes a loss of the substantive right. But it must always be remembered that "[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[27] Where it is possible, as it generally is, for a procedural error to occur without working the violation of a substantial right, let alone a constitutional right, then a conviction should not be upset. For example, arraignment is a procedure that protects a liberty interest—freedom from confinement—but that procedure may be violated in some ways, including not being sufficiently "prompt"

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that time it was believed in the federal system that materiality in a perjury case was the for court not the jury, and this Court found that the error was subject to plain-error review. Similarly, the Court in Neder v United States, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999) held that this error was also subject to harmless-error review under Rule 52(b) where the error was preserved. It is difficult to escape the conclusion that if an error in the failure to submit an element of the offense to the jury is capable of harmless-error review, then an error in the exercise of peremptory challenges that does not result in a partial jury is also capable of harmless-error review.

27. Olim v. Wakinekona, 461 US 238, 250, 103 S Ct 1741, 75 L Ed 2d 813 (1983).

under state law, without violating the federal constitutional interest involved.[28]

> As cogently put by one federal decision,
>
> Constitutionalizing every state procedural right would stand any due process analysis on its head. Instead of identifying the substantive interest at stake and then ascertaining what process is due to the individual before he can be deprived of that interest, the process is viewed as a substantive end in itself. The purpose of a procedural safeguard, however, is the protection of a substantive interest to which the individual has a legitimate claim of entitlement.[29]

Here, because the jury that sat cannot be said to have been partial, any error in maintaining the juror on the jury did not violate the substantive right involved –the right to an impartial jury.[30]

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28. See Watson v City of New York, 92 F3d 31, 38 (CA 2, 1996), affirming dismissal of civil rights claim based on violation of New York arraignment procedure, finding that the plaintiff's federal constitutional claim was erroneously premised on the proposition that a state law construction of the state arraignment statute itself created a liberty interest protected by the Fourteenth Amendment.

29. Shango v. Jurich, 681 F2d 1091, 101 (CA 7, 1982).

29. And see, so holding, People v Bell, 473 Mich. 275, 702 N.W.2d 128 (Mich, 2005); Whitney v State, 158 Md.App. 519, 857 A.2d 625 (Md App, 2004); Commonwealth v Carson, 741 A.2d 686 (PA, 1999).

Conclusion

WHEREFORE, this Court should affirm the Illinois Supreme Court.

KYM L. WORTHY
Wayne County
Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Phone: 313-224-5792